

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 20, 2018

SEAN F. MCAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

STEVEN LEE BROWN,
Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:17-cv-03056-MKD

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

ECF Nos. 15, 16

BEFORE THE COURT are the parties' Cross-motions for Summary

Judgment. ECF Nos. 15, 16. The parties consented to proceed before a magistrate judge. ECF No. 3. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's Motion (ECF No. 15) and grants Defendant's Motion (ECF No. 16).

ORDER - 1

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court’s review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner’s decision will be disturbed “only if it is not supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674

1 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
2 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
3 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
4 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
5 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
6 *Sanders*, 556 U.S. 396, 409-10 (2009).

7 **FIVE-STEP EVALUATION PROCESS**

8 A claimant must satisfy two conditions to be considered “disabled” within
9 the meaning of the Social Security Act. First, the claimant must be “unable to
10 engage in any substantial gainful activity by reason of any medically determinable
11 physical or mental impairment which can be expected to result in death or which
12 has lasted or can be expected to last for a continuous period of not less than twelve
13 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s
14 impairment must be “of such severity that he is not only unable to do his previous
15 work[,] but cannot, considering his age, education, and work experience, engage in
16 any other kind of substantial gainful work which exists in the national economy.”
17 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential analysis to
19 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
20 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner

1 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);
2 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(b); 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis
6 proceeds to step two. At this step, the Commissioner considers the severity of the
7 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
8 claimant suffers from "any impairment or combination of impairments which
9 significantly limits [his or her] physical or mental ability to do basic work
10 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
11 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
12 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
13 §§ 404.1520(c); 416.920(c).

14 At step three, the Commissioner compares the claimant's impairment to
15 severe impairments recognized by the Commissioner to be so severe as to preclude
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

20

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1 If the severity of the claimant’s impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
4 defined generally as the claimant’s ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant’s
9 RFC, the claimant is capable of performing work that he or she has performed in
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
11 If the claimant is capable of performing past relevant work, the Commissioner
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
13 If the claimant is incapable of performing such work, the analysis proceeds to step
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant’s
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
18 the Commissioner must also consider vocational factors such as the claimant’s age,
19 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
3 work, analysis concludes with a finding that the claimant is disabled and is
4 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

5 The claimant bears the burden of proof at steps one through four above.

6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
7 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
8 capable of performing other work; and (2) such work “exists in significant
9 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2);
10 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

11 ALJ’S FINDINGS

12 In January 2014, Plaintiff applied for Title II disability insurance benefits
13 and Title XVI supplemental security income, alleging an onset date of July 1,
14 2009. Tr. 187-96. The applications were denied initially, Tr. 114-28, and on
15 reconsideration, Tr. 130-39. Plaintiff appeared at a hearing before an
16 administrative law judge (ALJ) on August 4, 2015. Tr. 30-68. On August 12,
17 2015, the ALJ denied Plaintiff’s claim. Tr. 11-24.

18 At step one of the sequential evaluation process, the ALJ found Plaintiff has
19 not engaged in substantial gainful activity since July 1, 2009. Tr. 13. At step two,
20 the ALJ found Plaintiff has the following severe impairments: right ankle

1 impairment, organic cognitive disorder, affective disorder, anxiety disorder,
2 personality disorder, and substance use disorder. Tr. 13. At step three, the ALJ
3 found Plaintiff does not have an impairment or combination of impairments that
4 meets or medically equals the severity of a listed impairment. Tr. 14. The ALJ
5 then concluded that Plaintiff has the RFC to perform medium work with the
6 following limitations:

[H]e cannot climb ladders, rope, or scaffolding. He can frequently handle and finger. He should avoid concentrated exposure to vibration, extreme cold, and workplace hazards. He should avoid concentrated exposure to pulmonary irritants. He can perform simple and routine tasks. He can have superficial interaction with coworkers. Interaction with the public should not be a required element of his job duties.

Tr. 16.

At step four, the ALJ found Plaintiff is unable to perform any past relevant work. Tr. 22. At step five, the ALJ found there are jobs that exist in significant numbers in the national economy that Plaintiff can perform, such as industrial cleaner, laundry worker II, store laborer, production assembler, cleaner/housekeeper, and hand packager. Tr. 23. On January 23, 2017, the Appeals Council denied review of the ALJ's decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

ISSUES

2 Plaintiff seeks judicial review of the Commissioner's final decision denying
3 him disability insurance benefits under Title II and supplemental security income
4 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
5 issues for review:

1. Whether the ALJ properly evaluated Plaintiff's symptom complaints; and
 2. Whether the ALJ properly evaluated the medical opinion evidence.

⁸ | ECF No. 15 at 6.

DISCUSSION

A. Plaintiff's Symptom Testimony

1 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
2 convincing in discrediting his symptom claims. ECF No. 15 at 6-17. An ALJ
3 engages in a two-step analysis to determine whether a claimant's testimony
4 regarding subjective pain or symptoms is credible. "First, the ALJ must determine
5 whether there is objective medical evidence of an underlying impairment which
6 could reasonably be expected to produce the pain or other symptoms alleged."

Molina, 674 F.3d at 1112 (internal quotation marks omitted). “The claimant is not required to show that [his] impairment could reasonably be expected to cause the severity of the symptom []he has alleged; []he need only show that it could

1 reasonably have caused some degree of the symptom.” *Vasquez v. Astrue*, 572
2 F.3d 586, 591(9th Cir. 2009) (internal quotation marks omitted).

3 Second, “[i]f the claimant meets the first test and there is no evidence of
4 malingering, the ALJ can only reject the claimant’s testimony about the severity of
5 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
6 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting
7 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)). “General findings are
8 insufficient; rather, the ALJ must identify what testimony is not credible and what
9 evidence undermines the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81
10 F.3d 821, 834 (9th Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.
11 2002) (“[T]he ALJ must make a credibility determination with findings sufficiently
12 specific to permit the court to conclude that the ALJ did not arbitrarily discredit
13 claimant’s testimony.”). “The clear and convincing [evidence] standard is the most
14 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
15 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
16 924 (9th Cir. 2002)).

17 In making an adverse credibility determination, the ALJ may consider, *inter*
18 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
19 claimant’s testimony or between his testimony and his conduct; (3) the claimant’s
20 daily living activities; (4) the claimant’s work record; and (5) testimony from

1 physicians or third parties concerning the nature, severity, and effect of the
2 claimant's condition. *Thomas*, 278 F.3d at 958-59.

3 The ALJ concluded that Plaintiff's medically determinable impairments
4 could reasonably be expected to cause Plaintiff's alleged symptoms, but that
5 Plaintiff's testimony about the intensity, persistence, and limiting effects of his
6 symptoms was not credible. Tr. 17.

7 1. *Inconsistent with Medical Evidence*

8 The ALJ found Plaintiff's symptom testimony was inconsistent with the
9 longitudinal medical record. Tr. 17-18. An ALJ may not discredit a claimant's
10 pain testimony and deny benefits solely because the degree of pain alleged is not
11 supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 856
12 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v.*
13 *Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). Medical evidence is a relevant factor,
14 however, in determining the severity of a claimant's pain and its disabling effects.
15 *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c), 416.929(c)(2). Minimal
16 objective evidence is a factor which may be relied upon in discrediting a claimant's
17 testimony, although it may not be the only factor. *See Burch v. Barnhart*, 400 F.3d
18 676, 680 (9th Cir. 2005).

19 Here, the ALJ found Plaintiff's symptom testimony about his ankle pain was
20 not supported by the medical evidence, which showed substantial improvement in

1 Plaintiff's condition and did not corroborate the level of impairment Plaintiff
2 alleged. Tr. 17-18. At the hearing, Plaintiff testified that following his ankle
3 surgery, he experienced sharp pains when he walked, numbness, swelling, and that
4 he needed to elevate his leg over his heart several times per day to control the
5 swelling. Tr. 42-43. As the ALJ noted, Plaintiff had successful ankle surgery in
6 November 2013. Tr. 18, *see* Tr. 308-10. On March 4, 2014, Plaintiff reported he
7 felt 75% improved. Tr. 370. The ALJ observed Plaintiff's treatment notes after
8 the surgery show he was regularly observed to have normal gait and station,
9 normal movement, and normal muscle strength. Tr. 18; *see* Tr. 399 (no abnormal
10 movement, good station and gait, good muscle strength), Tr. 429 (no abnormal
11 movement, station and gait unimpaired, good muscle strength), Tr. 435 (same), Tr.
12 438 (same), Tr. 445 (same), Tr. 451 (same), Tr. 457 (same). In May 2015, three
13 months before the hearing, Plaintiff specifically denied difficulty walking. Tr. 390.
14 The ALJ also noted that Plaintiff's treatment records do not show a record of
15 chronic swelling, numbness, or a need to elevate his leg. Tr. 18. The ALJ
16 reasonably concluded that the medical record failed to support Plaintiff's
17 subjective symptom testimony regarding his ankle impairment after surgery.

18 The ALJ similarly found the medical evidence did not support Plaintiff's
19 mental health symptom complaints. Tr. 18. Plaintiff testified that he experienced
20 constant anxiety, was prone to anxiety attacks around other people, that he had

1 several anxiety attacks per day lasting 30-40 minutes at a time, and that his
2 depression caused him to break down and cry several times per week. Tr. 38-39.
3 However, the ALJ observed the medical record regularly showed Plaintiff
4 demonstrated alert and cooperative behavior, normal speech, normal thought
5 process, and good concentration and attention span. Tr. 18; *see* Tr. 399-400, 425,
6 429-30, 435-36, 438-39, 445-46, 451-52, 457-58. The record also shows Plaintiff
7 demonstrating appropriate mood and affect. Tr. 298, 302, 306, 347, 360, 389-91,
8 436, 446, 469. The ALJ noted the record did not show a diagnosis of mental
9 impairment until 2013, despite Plaintiff's alleged onset date in 2009. Tr. 18.

10 Plaintiff can identify some evidence in the record that shows abnormal
11 mental health observations. ECF No. 15 at 9-10; *see* Tr. 274 (abnormal affect), Tr.
12 281-82 (abnormal mental status examination), Tr. 320-37 (observations of
13 depressed mood). However, in reviewing a denial of benefits, a district court may
14 not substitute its judgment for that of the Commissioner. *Edlund*, 253 F.3d at
15 1156. If the evidence in the record "is susceptible to more than one rational
16 interpretation, [the court] must uphold the ALJ's findings if they are supported by
17 inferences reasonably drawn from the record." *Molina*, 674 F.3d at 1111. Even if
18 Plaintiff can identify evidence that can be interpreted more favorably to Plaintiff's
19 position, the evidence is susceptible to more than one rational interpretation, and
20 therefore the ALJ's ultimate conclusion must be upheld. *See Burch*, 400 F.3d at

1 679. The lack of supporting medical evidence was a clear and convincing reason
2 to discredit Plaintiff's subjective symptom testimony.

3 2. *Failure to Follow Treatment Recommendations*

4 The ALJ found Plaintiff's symptom testimony was inconsistent with
5 Plaintiff's failure to follow treatment recommendations. Tr. 18. It is well-
6 established that unexplained or inadequately explained non-compliance with
7 treatment reflects on a claimant's credibility. *See Molina*, 674 F.3d at 1113-14;
8 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *see also Smolen v.*
9 *Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (an ALJ may consider a claimant's
10 unexplained or inadequately explained failure to follow a prescribed course of
11 treatment when assessing a claimant's credibility).

12 The ALJ identified several instances where Plaintiff failed to follow
13 treatment recommendations. Tr. 18. For example, Plaintiff was referred to
14 physical therapy in March 2014, after his ankle surgery. Tr. 370-71. However, the
15 ALJ observed the evidence shows no subsequent treatment record for Plaintiff's
16 ankle impairment. Tr. 18. Plaintiff was referred to mental health counseling in
17 April 2013 and declined the referral. Tr. 274-75. Plaintiff also reported ceasing to
18 take prescribed medication because he felt it did not help him, and he failed to
19 follow up for further care after ceasing the medication. Tr. 273.

1 Plaintiff argues that his failure to seek treatment was due to his lack of
2 medical insurance. ECF No. 15 at 8. Disability benefits may not be denied
3 because of the claimant's failure to obtain treatment he cannot obtain for lack of
4 funds. *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995). Plaintiff cites one
5 instance in the record where Plaintiff reported he did not seek medical attention
6 after being hit by a car some time in 2012 because he did not have insurance. Tr.
7 318. However, Plaintiff's lack of insurance in 2012 does not explain his
8 subsequent failure to follow treatment recommendations. Furthermore, the record
9 shows Plaintiff was able to obtain medical treatment throughout the relevant time
10 period despite his lack of insurance in 2012. *See, e.g.*, Tr. 308-10 (ankle surgery),
11 Tr. 316-17 (MRI imaging), Tr. 393 (hand surgery).

12 Plaintiff argues that his failure to pursue treatment is attributable to his
13 anxiety. ECF No. 15 at 7-8. In some cases, it may be inappropriate to consider a
14 claimant's lack of treatment as evidence of a lack of credibility. *See Nguyen v.*
15 *Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996). However, when there is no evidence
16 suggesting a failure to seek treatment is attributable to a mental impairment, it is
17 reasonable for the ALJ to conclude that the level or frequency of treatment is
18 inconsistent with the level of complaints. *Molina*, 674 F.3d at 1113-14. Here, the
19 record fails to support Plaintiff's argument. The supporting evidence Plaintiff cites
20 does not attribute Plaintiff's lack of treatment to anxiety. *See* Tr. 42 (Plaintiff does

1 not attribute failure to seek treatment due to anxiety), Tr. 304 (does not indicate
2 why Plaintiff failed to seek earlier treatment), Tr. 354 (does not indicate why
3 Plaintiff failed to seek earlier treatment), Tr. 465 (does not indicate why Plaintiff
4 failed to seek treatment at time of hand injury). The only supporting evidence in
5 the record is Plaintiff's own testimony that Plaintiff "couldn't calm [himself] down
6 to go" seek medical treatment after having a gun pulled on him and escaping by
7 running into traffic. Tr. 49. However, this one instance does not adequately
8 explain Plaintiff's consistent history of failing to seek medical treatment. The ALJ
9 reasonably concluded that Plaintiff's failure to seek treatment undermined the
10 severity of his subjective symptom testimony. This was a clear and convincing
11 reason to discredit Plaintiff's symptom testimony.

12 3. *Activities of Daily Living*

13 The ALJ found Plaintiff's daily activities were inconsistent with the level of
14 impairment he alleged. Tr. 19. A claimant's reported daily activities can form the
15 basis for an adverse credibility determination if they consist of activities that
16 contradict the claimant's "other testimony" or if those activities are transferable to
17 a work setting. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007); *see also Fair*,
18 885 F.2d at 603 (daily activities may be grounds for an adverse credibility finding
19 "if a claimant is able to spend a substantial part of his day engaged in pursuits
20 involving the performance of physical functions that are transferable to a work

1 setting.”). “While a claimant need not vegetate in a dark room in order to be
2 eligible for benefits, the ALJ may discredit a claimant’s testimony when the
3 claimant reports participation in everyday activities indicating capacities that are
4 transferable to a work setting” or when activities “contradict claims of a totally
5 debilitating impairment.” *Molina*, 674 F.3d at 1112-13 (internal quotation marks
6 and citations omitted).

7 Plaintiff testified that he experienced constant anxiety, that being in public
8 or around other people caused anxiety attacks, and he could not stay in public
9 places when he has anxiety attacks. Tr. 38. He further testified that his anxiety
10 attacks lasted for thirty to forty minutes at a time and occurred several times per
11 day. Tr. 38-39. The ALJ noted that these limitations were inconsistent with
12 Plaintiff’s travel. Plaintiff reported taking a three-week trip to Alaska to visit his
13 brother. Tr. 46. Plaintiff reported taking a shuttle from Yakima to Seattle-Tacoma
14 International Airport and flying from Seattle to Alaska. Tr. 45-46. While in
15 Alaska, Plaintiff spent time with his brother and visited a bar. Tr. 46. The ALJ
16 reasonably concluded that these activities were inconsistent with Plaintiff’s
17 testimony that he was unable to be around others without experiencing debilitating
18 panic attacks. Tr. 19.

19 Plaintiff’s function self-report also describes limitations in memory,
20 completing tasks, concentration, understanding, following instructions, and getting

1 along with others, and states Plaintiff cannot pay attention for more than three
2 minutes at a time. Tr. 234. The ALJ observed these limitations were inconsistent
3 with Plaintiff's ability to complete his high school diploma through online classes,
4 for which he worked over the course of several months. Tr. 19; *see* Tr. 463.
5 Plaintiff's alleged inability to pay attention for more than three minutes at a time is
6 also inconsistent with Plaintiff's hobby of playing multiplayer video games. Tr.
7 19; *see* Tr. 53-54. The inconsistencies between Plaintiff's testimony regarding his
8 symptoms and his daily activities were a clear and convincing reason for the ALJ
9 to discredit Plaintiff's symptom testimony.

10 4. *Inconsistent Statements*

11 The ALJ found Plaintiff's credibility was undercut by Plaintiff's inconsistent
12 statements in the record. Tr. 19. In evaluating the credibility of symptom
13 testimony, the ALJ may utilize ordinary techniques of credibility evaluation,
14 including prior inconsistent statements. *See Smolen*, 80 F.3d at 1284. Conflicting
15 or inconsistent reporting of alcohol or drug use can also contribute to an adverse
16 credibility finding. *See Thomas*, 278 F.3d at 959; *Verduzco v. Apfel*, 188 F.3d
17 1087, 1090 (9th Cir. 1999).

18 The ALJ noted Plaintiff made inconsistent statements about his drug use
19 history. Tr. 19. On August 6, 2013, Plaintiff reported a history of drug use but no
20 current drug use. Tr. 318. On December 19, 2013, Plaintiff similarly reported a

1 history of drug use in his teens but no current drug use. Tr. 278. On April 22,
2 2014, Plaintiff reported smoking three to four marijuana joints daily. Tr. 399.
3 However, on May 28, 2014, Plaintiff denied any history of substance abuse. Tr.
4 457. The ALJ reasonably concluded that this denial of substance abuse was
5 inconsistent with Plaintiff's prior admissions of substance abuse.¹

6 The ALJ also noted Plaintiff gave inconsistent reasons for why he was fired
7 from his job at Dollar Tree. Tr. 19. During a 2013 therapy session, Plaintiff
8 reported he lost his job because he was using his cell phone too frequently at work.
9 Tr. 332-33. However, during the hearing, Plaintiff testified that he left his job at
10 Dollar Tree because of mental health symptoms. Tr. 39. Upon further questioning
11 by the ALJ, Plaintiff admitted he was fired from that job because he spent too

12 _____
13 ¹ Plaintiff argues the ALJ improperly considered Plaintiff's substance abuse itself
14 as a reason to discredit Plaintiff's credibility. ECF No. 15 at 13. However, the
15 ALJ did not find Plaintiff not credible because of Plaintiff's history of substance
16 abuse. Tr. 19. Rather, the ALJ's credibility determination was limited to
17 Plaintiff's inconsistent statements about his substance use. *Id.* Defendant's
18 discussion of Plaintiff's lack of status as a Washington medical marijuana patient
19 is similarly nonresponsive to the ALJ's finding. ECF No. 16 at 9-10.

1 much time texting his friends. Tr. 48. Plaintiff offers a series of hypothetical
2 explanations for Plaintiff's inconsistent statements, but these explanations do not
3 have any basis in the record. ECF No. 15 at 14. The ALJ reasonably concluded
4 that this inconsistent reporting undermined Plaintiff's credibility. Even if Plaintiff
5 can identify an interpretation of the evidence that is more favorable to Plaintiff's
6 position, the evidence is susceptible to more than one rational interpretation, and
7 therefore the ALJ's ultimate conclusion must be upheld. *See Burch*, 400 F.3d at
8 679. This was a clear and convincing reason to discredit Plaintiff's subjective
9 symptom testimony.

10 5. *Source of Anxiety*

11 Finally, the ALJ observed Plaintiff's alleged fear of public settings was "not
12 irrational" and "due to the situational consequences of his criminal history." Tr.
13 20. The ALJ failed to explain how the rationality of Plaintiff's fears is relevant to
14 the ALJ's credibility analysis. *See Wilson v. Comm'r, Soc. Sec. Admin.*, 2016 WL
15 1598867, at *9 (D. Or. Apr. 20, 2016).

16 Any error based on this observation is harmless. A district court "may not
17 reverse an ALJ's decision on account of an error that is harmless." *Molina*, 674
18 F.3d at 1111. An error is harmless "where it is inconsequential to the [ALJ's]
19 ultimate nondisability determination." *Id.* at 1115 (quotation and citation omitted).
20 Here, the ALJ identified several other clear and convincing reasons to discredit

1 Plaintiff's symptom testimony. Consequently, any error is harmless and not
2 grounds for reversal. *Id.* at 1111.

3 **B. Medical Opinion Evidence**

4 Plaintiff challenges the ALJ's consideration of the medical opinions of
5 Robert Bernardez-Fu, M.D.; Dan Donahue, Ph.D.; John Gilbert, Ph.D.; Philip
6 Barnard, Ph.D.; Steven Johansen, Ph.D.; and Doyle Hardy, LMHC. ECF No. 15 at
7 17-21.

8 There are three types of physicians: "(1) those who treat the claimant
9 (treating physicians); (2) those who examine but do not treat the claimant
10 (examining physicians); and (3) those who neither examine nor treat the claimant
11 [but who review the claimant's file] (nonexamining [or reviewing] physicians)."

12 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).

13 Generally, a treating physician's opinion carries more weight than an examining
14 physician's, and an examining physician's opinion carries more weight than a
15 reviewing physician's. *Id.* at 1202. "In addition, the regulations give more weight
16 to opinions that are explained than to those that are not, and to the opinions of
17 specialists concerning matters relating to their specialty over that of
18 nonspecialists." *Id.* (citations omitted).

19 If a treating or examining physician's opinion is uncontradicted, the ALJ
20 may reject it only by offering "clear and convincing reasons that are supported by

1 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
2 “However, the ALJ need not accept the opinion of any physician, including a
3 treating physician, if that opinion is brief, conclusory and inadequately supported
4 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
5 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
6 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
7 may only reject it by providing specific and legitimate reasons that are supported
8 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-
9 831).

10 1. *State Reviewers – Dr. Donahue, Dr. Gilbert, Dr. Bernardez-Fu*

11 Dr. Donahue reviewed the record and opined Plaintiff was capable of simple
12 and routine tasks; that Plaintiff could adhere to basic work structure and
13 expectations despite variation in concentration, persistence, and pace; that Plaintiff
14 would work best with simple and superficial social interactions; and that Plaintiff
15 had no limitation in adaptation. Tr. 88-90. Dr. Gilbert reviewed the record and
16 rendered the same opinions, and also opined Plaintiff did not have a medically
17 determinable psychological impairment through his date of last insured in June
18 2010. Tr. 102-04, 111. Dr. Bernardez-Fu reviewed the record and opined Plaintiff
19 was capable of performing medium work, except he should avoid concentrated
20 exposure to vibration and extreme cold; that Plaintiff should avoid even moderate

1 exposure to workplace hazards; that Plaintiff had no postural or manipulative
2 limitations; and that there was insufficient evidence of any physical impairment
3 through Defendant's date of last insured. Tr. 101-02, 111. The ALJ gave each of
4 these reviewers' opinions significant weight. Tr. 20, 22.

5 Plaintiff contends the ALJ erred by giving significant weight to the opinions
6 of Dr. Donahue, Dr. Gilbert, and Dr. Bernardez-Fu, all reviewing physicians, and
7 some or minimal weight to Plaintiff's treating or examining providers. ECF No.
8 15 at 17-18. The opinion of a nonexamining physician may serve as substantial
9 evidence if it is supported by other evidence in the record and is consistent with it.
10 *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995). Other cases have upheld
11 the rejection of an examining or treating physician based in part on the testimony
12 of a non-examining medical advisor when other reasons to reject the opinions of
13 examining and treating physicians exist independent of the non-examining doctor's
14 opinion. *Lester*, 81 F.3d at 831 (citing *Magallanes v. Bowen*, 881 F.2d 747, 751-
15 55 (9th Cir. 1989) (reliance on laboratory test results, contrary reports from
16 examining physicians and testimony from claimant that conflicted with treating
17 physician's opinion)); *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir. 1995)
18 (rejection of examining psychologist's functional assessment which conflicted with
19 his own written report and test results). Thus, case law requires not only an
20 opinion from the consulting physician but also substantial evidence (more than a

1 mere scintilla but less than a preponderance), independent of that opinion which
2 supports the rejection of contrary conclusions by examining or treating physicians.
3 *Andrews*, 53 F.3d at 1039.

4 The ALJ found the opinions of Dr. Donahue and Dr. Gilbert were consistent
5 with Plaintiff's medical records, examination findings, and Plaintiff's reported
6 activities. Tr. 22. The ALJ similarly found Dr. Bernardez-Fu's opinions were
7 supported by Plaintiff's examination findings and treatment records. Tr. 21-22.
8 Plaintiff suggests the ALJ should have credited the opinions of Plaintiff's treating
9 and examining providers over the opinions of the reviewing doctors. However, as
10 discussed *infra*, the ALJ provided legally sufficient reasons for giving less weight
11 to the treating and examining providers and for giving more weight to the
12 reviewing doctors' opinions.

13 2. *Dr. Barnard*

14 Dr. Barnard examined Plaintiff on December 19, 2013, and opined
15 Plaintiff's anxiety would affect his ability to work on a daily basis to a moderate
16 extent; that Plaintiff would have moderate limitations in his ability to understand,
17 remember, and persist, to learn new tasks by following very short and simple
18 instructions, to perform routine tasks without special supervision, be aware of
19 normal hazards and take precautions, ask simple questions or request assistance,
20 and set realistic goals and plan independently; that Plaintiff would have marked

1 limitations in his ability to understand, remember, and persist, to learn new tasks
2 by following detailed instructions, perform activities within a schedule, and make
3 simple work related decisions; and that Plaintiff would have severe limitations in
4 his ability to communicate and perform effectively in a work setting, complete a
5 normal workday without interruptions from psychologically based symptoms, and
6 maintain appropriate behavior in a work setting. Tr. 279-80. Because Dr.
7 Barnard's opinion was contradicted by Dr. Donahue, Tr. 88-90, and Dr. Gilbert,
8 Tr. 101-02, the ALJ was required to provide specific and legitimate reasons for
9 rejecting the opinion. *Bayliss*, 427 F.3d at 1216.

10 First, the ALJ found Dr. Barnard did not adequately explain his opinion. Tr.
11 21. Factors relevant to evaluating any medical opinion include the amount of
12 relevant evidence that supports the opinion and the quality of the explanation
13 provided in the opinion. 20 C.F.R. §§ 404.1527(c), 416.927(c); *Lingenfelter*, 504
14 F.3d at 1042; *Orn*, 495 F.3d at 631. Dr. Barnard opined a series of moderate,
15 marked, and severe limitations in Plaintiff's ability to perform basic work
16 activities. Tr. 280. However, Dr. Barnard's only clinical finding was anxiety,
17 which Dr. Barnard opined "would affect [Plaintiff's] ability to work on a daily
18 basis to a moderate extent." Tr. 279. The ALJ found Dr. Barnard did not explain
19 how a clinical finding of anxiety causing moderate impact on Plaintiff's ability to
20 work justified the diverse range of moderate, marked, and severe findings Dr.

1 Barnard made. Tr. 21. This was a specific and legitimate reason to reject Dr.
2 Barnard's opinion.

3 Second, the ALJ found Dr. Barnard's opinion was inconsistent with the
4 longitudinal medical record. Tr. 21. Relevant factors to evaluating any medical
5 opinion include the amount of relevant evidence that supports the opinion, the
6 quality of the explanation provided in the opinion, and the consistency of the
7 medical opinion with the record as a whole. *Lingenfelter*, 504 F.3d at 1042; *Orn*,
8 495 F.3d at 631. As discussed *supra*, the ALJ observed the medical record
9 regularly showed Plaintiff demonstrated alert and cooperative behavior, normal
10 speech, normal thought process, and good concentration and attention span. Tr.
11 18; *see* Tr. 399-400, 425, 429-30, 435-36, 438-39, 445-46, 451-52, 457-58. The
12 record also showed Plaintiff demonstrating appropriate mood and affect. Tr. 298,
13 302, 306, 347, 360, 389-91, 436, 446, 469. Even if Plaintiff can identify evidence
14 that can be interpreted more favorably to Plaintiff's position, the evidence is
15 susceptible to more than one rational interpretation, and therefore the ALJ's
16 ultimate conclusion must be upheld. *See Burch*, 400 F.3d at 679.

17 In light of the inconsistencies between Dr. Barnard's observations and the
18 record as a whole, the ALJ suggested Plaintiff may have exaggerated his symptoms
19 during Dr. Barnard's examination. Tr. 19, 21. Evidence that a claimant
20 exaggerated his symptoms is a clear and convincing reason to reject the doctor's

1 conclusions. *Thomas*, 278 F.3d at 958. The ALJ noted Plaintiff generally
2 displayed normal psychological functioning “except when seeking state
3 assistance.” Tr. 18. A review of the record supports the ALJ’s conclusion. The
4 longitudinal record of Plaintiff’s mental status examinations is inconsistent with
5 the findings of Dr. Barnard’s mental status examination. *Compare* Tr. 281-82 with
6 Tr. 298, 302, 306, 347, 360, 389-91, 399-400, 425, 429-30, 435-36, 438-39, 445-
7 46, 451-52, 457-58, 469. The ALJ reasonably concluded that Dr. Barnard’s
8 opinion was not supported by the longitudinal medical evidence.

9 Third, the ALJ found Dr. Barnard’s opinion was based heavily on Plaintiff’s
10 self-reports. Tr. 21. A physician’s opinion may be rejected if it based on a
11 claimant’s subjective complaints which were properly discounted. *Tonapetyan v.*
12 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Morgan v. Comm’r of Soc. Sec.*
13 *Admin.*, 169 F.3d 595, 602 (9th Cir. 1999); *Fair*, 885 F.2d at 604. “[W]hen an
14 opinion is not more heavily based on a patient’s self-reports than on clinical
15 observations, [this] is no evidentiary basis for rejecting the opinion.” *Ghanim*, 763
16 F.3d at 1162. Here, Dr. Barnard conducted a clinical interview that was based
17 entirely on Plaintiff’s self-reports. Tr. 278. Dr. Barnard also performed a mental
18 status examination, but the ALJ discredited the results because the inconsistencies
19 with the record suggested Plaintiff exaggerated his performance on this
20 examination. Tr. 21. As discussed *supra*, the ALJ gave several legally sufficient

1 reasons for rejecting Plaintiff's symptom testimony. Plaintiff argues that because
2 Dr. Barnard performed a mental status examination, the ALJ unreasonably
3 concluded that Dr. Barnard "relied heavily" on Plaintiff's self-reports. ECF No. 15
4 at 18-19. However, in light of the ALJ's observations of Plaintiff's mental status
5 examination results being inconsistent with the longitudinal evidence and
6 Plaintiff's activities, the ALJ reasonably concluded that the level of impairment Dr.
7 Barnard observed was not reflective of Plaintiff's capabilities and therefore based
8 heavily on Plaintiff's self-reports. Because the ALJ provided legally sufficient
9 reasons to discredit Plaintiff's symptom complaints, Dr. Barnard's reliance on
10 Plaintiff's subjective symptom complaints was a specific and legitimate reason to
11 discredit Dr. Barnard's opinions. The ALJ's conclusion is supported by substantial
12 evidence.

13 Fourth, the ALJ found Dr. Barnard's opinion was inconsistent with
14 Plaintiff's reported activities. Tr. 21. An ALJ may discount an opinion that is
15 inconsistent with a claimant's reported functioning. *Morgan*, 169 F.3d at 601-02.
16 For example, Dr. Barnard opined Plaintiff would have moderate to marked
17 impairments in his ability to understand, remember, and persist in tasks following
18 instructions. Tr. 280. However, the ALJ observed Plaintiff was able to complete
19 his high school diploma online and persisted in this task over the course of several
20 months. Tr. 19; *see* Tr. 463. Dr. Barnard also opined Plaintiff would be unable to

1 communicate in a regular competitive environment or outside of a sheltered
2 workshop. Tr. 280. However, the ALJ observed Plaintiff was able to travel to
3 Alaska by himself. Tr. 19; *see* Tr. 45-46. The ALJ reasonably concluded that Dr.
4 Barnard's opinion was inconsistent with Plaintiff's activities. This was a specific
5 and legitimate reason to discredit Dr. Barnard's opinion.

6 3. *Dr. Johansen*

7 Dr. Johansen reviewed Dr. Barnard's report on December 30, 2013, and
8 opined Plaintiff would have moderate limitations in his ability to understand,
9 remember, and persist, to learn new tasks by following very short and simple
10 instructions, to perform routine tasks without special supervision, be aware of
11 normal hazards and take precautions, ask simple questions or request assistance,
12 and set realistic goals and plan independently; that Plaintiff would have marked
13 limitations in his ability to understand, remember, and persist, to learn new tasks
14 by following detailed instructions, perform activities within a schedule, and make
15 simple work related decisions; and that Plaintiff would have severe limitations in
16 his ability to communicate and perform effectively in a work setting, complete a
17 normal workday without interruptions from psychologically based symptoms, and
18 maintain appropriate behavior in a work setting. Tr. 379. Because Dr. Johansen's
19 opinion was contradicted by Dr. Donahue, Tr. 88-90, and Dr. Gilbert, Tr. 101-02,

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1 the ALJ was required to provide specific and legitimate reasons for rejecting the
2 opinion. *Bayliss*, 427 F.3d at 1216.

3 The ALJ discredited Dr. Johansen's opinion for relying on Dr. Barnard's
4 discredited opinion. Tr. 21. An ALJ may reject an opinion that is based heavily on
5 another physician's properly discredited opinion. *Paulson v. Astrue*, 368 Fed.
6 App'x 758, 760 (9th Cir. 2010) (unpublished). The ALJ observed Dr. Johansen
7 reviewed only Dr. Barnard's report, and offered no independent objective findings
8 for his affirmation of Dr. Barnard's report. Tr. 21-22. Because the Court found
9 *supra* that the ALJ provided legally sufficient reasons to discredit Dr. Barnard's
10 opinion, this was a specific and legitimate reason to discredit Dr. Johansen's
11 opinion.

12 4. *Mr. Hardy*

13 Mr. Hardy provided mental health counseling to Plaintiff between August 5,
14 2013, and April 27, 2015. Tr. 386, 404. On April 7, 2015, opined Plaintiff's
15 anxiety rendered him unable "to work in a normal work environment at this time
16 and [he did] not have skills that would allow him to work at home." Tr. 386. Mr.
17 Hardy does not qualify as an acceptable medical source. 20 C.F.R. §§ 404.1502,

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1 416.902² (Acceptable medical sources are licensed physicians, licensed or certified
2 psychologists, licensed optometrists, licensed podiatrists, qualified speech-
3 language pathologists, licensed audiologists, licensed advanced practice registered
4 nurses, and licensed physician assistants). An ALJ is required to consider evidence
5 from non-acceptable medical sources. 20 C.F.R. §§ 404.1527(f), 416.927(f).³ An
6 ALJ must give reasons “germane” to each source in order to discount evidence
7 from non-acceptable medical sources. *Ghanim*, 763 F.3d at 1161.

8 First, the ALJ found Mr. Hardy’s opinion was heavily based on Plaintiff’s
9 subjective reporting. Tr. 22. A physician’s opinion may be rejected if it is based
10 on a claimant’s subjective complaints which were properly discounted.

11 *Tonapetyan*, 242 F.3d at 1149; *Morgan*, 169 F.3d at 602; *Fair*, 885 F.2d at 604. A
12 review of Mr. Hardy’s treatment notes shows the notes largely contain Plaintiff’s
13 self-reports, and little to no objective observation. Tr. 318-37, 366-69, 404, 410-
14 23, 433-34, 444, 450, 462-64. Because the ALJ provided legally sufficient reasons

15 _____
16 ² Prior to March 27, 2017, the definition of an acceptable medical source was
17 located at 20 C.F.R. § 416.913.

18 ³ Prior to March 27, 2017, the requirement that an ALJ consider evidence from
19 non-acceptable medical sources was located at 20 C.F.R. §§ 404.1513(d),
20 416.913(d).

1 to discredit Plaintiff's symptom complaints, Mr. Hardy's reliance on Plaintiff's
2 subjective symptom complaints was a germane reason to discredit Mr. Hardy's
3 opinion.

4 Second, the ALJ found Mr. Hardy's opinion was not based on any
5 documented examination of Plaintiff's psychological functioning. Tr. 22. A
6 medical opinion from a non-acceptable source is entitled to more weight if it is
7 supported by medical evidence. 20 C.F.R. §§ 404.1527(f), 416.927(f). Mr.
8 Hardy's treatment notes do not show mental status examinations or other objective
9 observations of Plaintiff's psychological functioning. Tr. 318-37, 366-69, 404,
10 410-23, 433-34, 444, 450, 462-64. This was a germane reason to discredit Mr.
11 Hardy's opinion.

12 Third, the ALJ found Mr. Hardy's opinion was inconsistent with Plaintiff's
13 reported activities. Tr. 22. Inconsistency with a claimant's daily activities is a
14 germane reason to reject lay testimony. *Carmickle v. Comm'r, Soc. Sec. Admin.*,
15 533 F.3d 1155, 1163-64 (9th Cir. 2008); *Lewis v. Apfel*, 236 F.3d 503, 512 (9th
16 Cir. 2001). For example, Mr. Hardy noted Plaintiff "rarely leaves his home and
17 never without the support of a family member." Tr. 386. However, the ALJ
18 observed Plaintiff was able to travel by himself from Yakima, Washington to
19 Alaska. Tr. 19. Indeed, many of Mr. Hardy's treatment notes document Plaintiff
20 attending his sessions without a family member accompanying him. Tr. 404, 410,

1 414-423. Despite Mr. Hardy's extensive treatment history with Plaintiff, and thus
2 longer-term ability to observe Plaintiff's functioning, Mr. Hardy's opined
3 limitations are so extreme that they are clearly inconsistent with Plaintiff's
4 activities. This was a germane reason to discredit Mr. Hardy's opinion.

5 Fourth, the ALJ found Mr. Hardy’s opinion was inconsistent with the
6 longitudinal medical evidence. Tr. 22. Inconsistency with the medical evidence is
7 a germane reason for rejecting lay witness testimony. *See Bayliss*, 427 F.3d at
8 1218; *Lewis*, 236 F.3d at 511. Although Mr. Hardy opined Plaintiff’s anxiety was
9 severely limiting, the longitudinal record shows Plaintiff demonstrated alert and
10 cooperative behavior, normal speech, normal thought process, and good
11 concentration and attention span. Tr. 18; *see* Tr. 399-400, 425, 429-30, 435-36,
12 438-39, 445-46, 451-52, 457-58. The record also shows Plaintiff demonstrating
13 appropriate mood and affect. Tr. 298, 302, 306, 347, 360, 389-91, 436, 446, 469.
14 The ALJ reasonably concluded that this record was inconsistent with Mr. Hardy’s
15 opinion. This was a germane reason to discredit Mr. Hardy’s opinion.

CONCLUSION

17 After review, the Court finds that the ALJ's decision is supported by
18 substantial evidence and free of harmful legal error.

19 | IT IS ORDERED:

- 20 1. Plaintiff's motion for summary judgment (ECF No. 15) is **DENIED**.

2. Defendant's motion for summary judgment (ECF No. 16) is **GRANTED**.

The District Court Executive is directed to file this Order, enter **JUDGMENT**

FOR THE DEFENDANT, provide copies to counsel, and **CLOSE THE FILE**.

DATED April 20, 2018.

s/Mary K. Dimke

MARY K. DIMKE

UNITED STATES MAGISTRATE JUDGE